

Employment Law FAQs: Hotel and Leisure Sector

GOODMAN DERRICK LLP

Having acted for clients in the hotel and leisure industry for many years, the Employment team at Goodman Derrick LLP recognises that this sector is heavily reliant on the proper performance of its staff. This bulletin aims to address, in a practical way, some of the issues which commonly arise in this sector, and to give realistic guidance on how to reduce the risk of employment related litigation.

LEGAL UPDATES

Increases in statutory payments

Statutory maternity, adoption and paternity pay increased to £117.18 per week from 1 April 2008 and statutory sick pay rose to £75.40 per week from 6 April 2008.

Information and consultation requirements

From 6 April 2008, the Information and Consultation of Employees Regulations 2004 applies to all undertakings employing 50 or more employees. This means that, if a valid request is made by employees, the employer must negotiate an agreement with them setting out how it will inform and consult about economic and employment-related issues. Such a process may be avoided if there is a pre-existing arrangement already in place.

Additionally, for undertakings with 50 or more employees, there will be an obligation to consult with employees before making changes to occupational or personal pension schemes (including stakeholder schemes) where there are direct payment arrangements in place enabling an employer to make contributions.

FAQs

Q: Our head chef is extremely aggressive and frequently bullies the kitchen staff. Should we be worried?

The head chef's behaviour will not only demoralise your staff, but could lead to legal action against you as an employer is vicariously liable for the actions of their employees in the course of employment.

If the bullying is based on discriminatory grounds (for example, because

of someone's sex, race, religion, disability, etc), it could lead to a claim of harassment under the discrimination legislation. Harassment is defined in this legislation as being unwanted conduct by a person (e.g. the head chef) which has the purpose or effect of violating another person's (e.g. a member of the kitchen staff) dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. From this definition it can be seen that



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bullying can amount to discriminatory harassment. A successful discrimination claim can result in compensation being awarded for injury to feelings and loss of earnings. The amount of compensation that can be awarded is unlimited.

Depending on the seriousness of the bullying and your reaction to any complaint that is raised, the employee may also have a constructive unfair dismissal claim as they may argue that, by allowing or failing to address the bullying, you failed to provide them with a suitable working environment and/or that the trust and confidence between you has been undermined. This situation could arise even where the bullying is on non-discriminatory grounds, such as teasing someone because of the colour of their hair. The compensation awarded in a successful unfair dismissal claim is based on the employee's age, length of service and weekly pay as well as their loss of earnings. Compensation is currently capped at £72,900.

In addition, if there has been a lengthy and oppressive campaign of bullying, there may be criminal and civil liability under the Protection from Harassment Act 1997. Further, racially aggravated harassment may constitute a criminal offence under the Crime and Disorder Act 1998.

To avoid such claims (and to hopefully achieve a happier workforce), it is advisable to introduce and enforce an anti-harassment and bullying policy. Such a policy should make it clear that bullying is never acceptable and will not be tolerated. The policy should also give details on what to do if an employee is being bullied (for example, that the complaint can either be dealt with informally or via the formal grievance procedure) and also address what action may be taken against the "bully" (i.e. that if an investigation shows the complaint to be well-founded, disciplinary action will be taken, which could result in dismissal).

To properly implement such a policy, equal opportunities training should be provided to staff so that the standards of behaviour are clearly understood by all. Taking these steps may provide a defence to subsequent claims.

Q: We commonly ask our staff to work overtime. Is there a limit on how much overtime we can ask for?

There are a multitude of rules regarding the hours that a person can work. These rules not only apply to employees but also to workers, including agency workers.

Firstly, there is a limit on the maximum weekly time that a worker can work. This is capped at an average of 48 hours, calculated over a 17-week reference period. However, it is possible to seek the worker's agreement to work in excess of this 48-hour limit (although such opt-out must be obtained voluntarily, in writing and be terminable on not more than 3 months notice). It should also be remembered that regardless of any opt-out, there is an overriding obligation to protect the worker's health and safety so they should not be required to work excessive hours.

For night workers, being those that work at least three hours during the period of 11pm to 6am, there are more restrictive rules. Night workers must not work more than an average of 8 hours in each 24-hour period, calculated over a 17-week reference period (or where the night work involves special hazards or heavy physical or mental strain, there is an absolute cap of 8 hours per 24-hour period). Night workers must also be offered health assessments to check the impact of the night work and if health problems are identified as being connected to the night work, there is a requirement to transfer the worker to day work, where possible.

Employers are obliged to keep records for 2 years to show that they have complied with the limits on average working time, night working and health assessments.

Secondly, there are obligations to provide the workers with adequate rest breaks. In summary, a worker should be allowed:

- at least 20 consecutive minutes rest if working for a period of 6 hours or more;
- least 11 consecutive hours rest in each 24-hour period; and

- at least two 24-hour or one 48-hour uninterrupted rest break in each 14-day period.

Special rules may apply whereby employees can be given compensatory rest breaks in lieu of the above, for example, where there is a surge of activity, unforeseen circumstances or at a shift changeover.

In addition, it should be remembered that workers are entitled to 4.8 weeks of annual leave (rising to 5.6 weeks from 1 April 2009), subject to a maximum cap of 28 days per annum. This can include public holidays.

Finally, it should be noted that many of the above rules can be modified by way of a collective or workforce agreement. Also, there are more restrictive requirements in respect of young workers (being those under 18) and special rules for some categories of workers, such as those in the transport sector.

With the above in mind, it is important to ensure that any overtime worked still takes into account the working time limits, rest breaks and holiday entitlement as well as complying with the employer's general duty regarding health and safety.

Q: We suspect that a member of the housekeeping team is stealing money from our guests. Can we stop and search them?

There is no legal right to stop and search your employees. If you want to reserve that right, you need to have an express contractual provision detailing this. If you do not already have such a provision in place, you can only introduce this with the agreement of the employee as an employer is unable to unilaterally impose contractual changes. Even where a contractual term does exist, the right must be exercised reasonably so best practice is to obtain the employee's express consent before any search is carried out.

It is also often extremely useful to have a policy explaining the circumstances in which you will exercise the right to stop and search and the consequences of an employee failing to co-operate (i.e. that a failure to comply may amount to a breach

of contract and/or a failure to follow a reasonable instruction, for which disciplinary action may be taken).

When undertaking a search, you should ensure that it is carried out in private, by someone of the same sex and by someone who has been trained to conduct the searches properly. Also, it is sensible to allow the employee the option of having a witness of their choice in attendance. Further, it is important that the stop and search right is used appropriately, that searches are not excessive in terms of frequency or extent and that the right is exercised in a non-discriminatory manner.

If you go ahead with a search without permission, it would almost certainly be a breach of trust and confidence (leading to a constructive dismissal claim). If a search of the employee's person is carried out without permission, this can also lead to criminal charges for assault, battery, false imprisonment and even sexual assault as well as a civil offence of trespass to the person.

Q: We have just discovered that our newly appointed general manager has lied on his CV about his academic qualifications. He has been employed by us for 4 months. Can we sack him?

To lawfully terminate an employee's employment, usually the employer must have a fair reason for the dismissal and must follow a fair procedure to effect the dismissal. However, only employees with one or more year's service have the right to bring an unfair dismissal claim (although there are some exceptions to this rule, for example, where the dismissal is because the employee asserted a statutory right). As the general manager has only four months' service, he will not be able to bring an unfair dismissal claim. He may however try to construct a different type of claim out of the dismissal for which no requisite period of employment is required, such as a claim for discrimination.

Despite the fact that he is unable to bring an unfair dismissal action, it is still important that a fair procedure is followed. Best practice would be to follow the statutory disciplinary and dismissal

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procedure. This consists of three steps: (i) a letter to the employee confirming that you are considering dismissal and explaining the reasons why, (ii) a meeting with the employee to discuss the situation further and subsequently writing to them with your decision and (iii) allowing the employee an opportunity to appeal if they so wish. It is best practise for two reasons: (1) it makes it clear what your reason for dismissal is (i.e. that it is for non-discriminatory reasons) and (2) if the statutory procedure is not followed but the employee subsequently brings a successful employment tribunal claim (e.g. by claiming that the dismissal was for a discriminatory reason), any compensation awarded could be increased by 10% to 50% to reflect your failure to follow the

statutory procedure.

Finally, it should be remembered that as a contract of employment is in place, notice will need to be given in order to terminate the employment relationship (unless the lie by the employee is so serious that it constitutes gross misconduct, entitling you to terminate the contract summarily i.e. without notice). The amount of notice will be governed by the terms of the contract, although this is subject to a statutory minimum notice period equivalent to 1 week's notice per year of service, capped at a maximum of 12 weeks notice after 12 years continuous service. If incorrect notice or no payment in lieu of notice is given, the employee will have a wrongful dismissal claim.



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Key Employment Services for the Hotel and Leisure Sector:

- Providing general employment law advice and HR support
- Drafting and reviewing employment contracts, staff handbooks and service licences
- Employment due diligence, including examination and reports on staff contracts, during the course of a sale or purchase of a business.

If you would like further information about the issues raised in this newsletter, or any other aspect of employment law, please contact Helen Wyatt, Head of Employment, or any other member of Goodman Derrick LLP's employment department.

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